Supreme Court, U.S.
FILED

03 474 SEP 24 2003

In the

Supreme Court of the United States

FREDERICK KAPLAN,

Petitioner,

v.

CITY OF NORTH LAS VEGAS, a Municipal Corporation of the State of Nevada; STEPHENS H. THOMAS, Officially, as an employee and agent of the City of Las Vegas,

Respondents.

Petition for a Writ of Certiorari to the
The United States Court of Appeals
for the Ninth Circuit

PETITON FOR WRIT OF CERTIORARI

James E. Gallo, Jr., Esq.
Counsel of Record
The Law Office of
Andrew M. Leavitt, Esq.
633 South Seventh Street
Las Vegas, Nevada 89101
(702) 382-2800
Attorney for Petitioner

CURRY & TAYLOR ♦ WASH D.C. ♦ (202) 223-3160 ♦USSCINFO.COM

QUESTION PRESENTED

Whether an employee, with a physical impairment, who establishes statutory disability pursuant to 42 U.S.C. § 12102(2)(c) is entitled to reasonable accommodations pursuant to 42 U.S.C. § 12111(8)(9) and the mandatory interactive process, Barnett v. U.S. Air, 228 F. 3d 1105, 1112, (9th Cir. 2000), rev'd on other grounds, U.S. Airways v. Barnett 122 S. Ct. 1516, 1525; 152 L.Ed.2d 589, 605 (2002); See also U.S. Airways at 1525-1526; 605-606, (Stevens, J., concurring)(noting that the Ninth Circuit's holding with respect to interactive process was "correct" and "is" untouched by the [Supreme] Court's opinion").

PARTIES TO THE PROCEEDING

1. Petitioner, Frederick Kaplan

2. Respondent, City o[illegible]th Las Vegas

3. Respondent, Thomas Stevens

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE WRIT 6

CONCLUSION 29

APPENDIX

CIRCUIT COURT ORDER (04/01/2003) 1a

DISTRICT COURT ORDER (04/22/2002) 15a

CIRCUIT COURT ORDER (05/07/2003) 32a

ORDER DENYING REHEARING 33a

TABLE OF AUTHORITIES

CASES

BARNETT V. U.S. AIR, 228 F. 3D 1105, 1112, (9TH CIR. 2000), REV'D ON OTHER GROUNDS, 122 S. CT. 1516, 1527 ..... i, 25, 27

BRAGDON V. ABBOTT, 524 U.S. 624, 632, 141 L. ED 2D 540, 118 S. CT. 2196 (1998) 14

DEANE V. POCONO MED CENTER., 142 F3D 138, 148 N. 12 (3D CIR. 1998) (EN BANC) 19

HUMPHREY V. MEMORIAL HOSPITAL ASSOCIATION, 239 F.3D 1128, 1137 (9TH CIR. 2001) 28

JACQUES V. DIMARZIO 200 F. SUPP. 2D 151, 166-167; (2002), H.R. REP 101-485 (III), 1990 U.S.C.C.A.N. 445, 453 13

JEWELL V. REID'S CONFECTIONARY 172 F. SUPP. 2D 212, 219 (2001) 11, 12

KAPLAN V. CITY OF NORTH LAS VEGAS 2 FED. APPX. 727 (2001) 21

KAPLAN V. CITY OF NORTH LAS VEGAS 323 F. 3D 1226, 1232 (2003) ..... *passim*

KAPLAN V. CITY OF NORTH LAS VEGAS, 2001 W.L. 50532 5

KATZ V. CITY METAL COMPANY KATZ V. CITY METAL CO. 87 F.3D 26, 33 (1996) 6, 10, 11

NEWBERRY V. E. TEXAS STATE UNIV., 161 F3D 276, 280 (5TH CIR. 1998) 19

PIRIE V. CHICAGO TITLE & TRUST COMPANY 182 U.S. 438, 451, 21 S. CT. 906, 911-912, 45 L. ED. 1171, 1179 (1901) 18, 22, 23, 24

ROYAL FOODS CO., INC. V. RJR HOLDINGS, INC., 252 F.3D 1102, 1108 (9TH CIR. 2001) 17

SCH.BD. OF NASSAU COUNTY V. ARLINE, 480 U.S. 273, 284, 94 L. ED. 2D 307, 107 S. CT. 1123 (1987) 13

SMITH V MIDLAND BRAKE INC., 180 F.3D 1154, 1172 (10TH CIR. 1999) 26, 27

STURGES V. CROWNINSHIELD, 4 WHEAT. 202 (1819) 18

SUTTON V. UNITED AIR LINES, INC., 527 U.S. 471, 493, 144 L.ED. 2D 450, 119 S. CT. 2139 (1999) 21

TAYLOR V. PATHMARK STORES, INC., 177 F.3D 180, 196 (3RD CIR. 1999) 23

TVA V. HILL, 437 U.S. 153, 187, N. 33 (1978) 17

U.S. AIRWAYS V. BARNETT 122 S. CT. 1516, 1525-1526, 152 L.ED.2D 589, 605-606 (2002) ..... i, 6, 25

UNITED STATES V. FISHER 2 CRANCH, 358, 389 (1805) 18

WEBER V. SCRIPPIT, 186 F.3D 907 (8TH CIR. 1999) 11, 16, 19, 20

WORKMAN V. FRITO-LAY, INC., 165 F. 3D 460, 467 (6TH CIR. 1999) 19

STATUTES

42 U.S.C. 12101 ..... 1, 16

42 U.S.C 12101(2)(c) 20, 21

42 U.S.C. 12101(7) 1, 9

42 U.S.C. 12101(b) 9

42 U.S.C. 12101(b)(1)(2) 2

42 U.S.C. 12101(C) 25

42 U.S.C. 12102(2)(c) ..... i, 5, 6, 7

42 U.S.C. 12102(C) 15

42 U.S.C. 12102(C)(2) 7, 8

42 U.S.C. 12111 16

42 U.S.C. 12111(8)(9) ..... *passim*

OTHER AUTHORITIES

H.R. REP. NO. 101-485, PT. 2, AT 65 (1990) 26

S. REP. NO 101-116, AT 34 (1989) 26

U.S. CODE CONG. & ADMIN. NEWS AT 303, 348 26

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit dated April 1, 2003, is published and can be found at Kaplan v. City of North Las Vegas 323 F. 3d 1226, 1232 (2003) and is reprinted at pages App. 1a to 14a of the Petitioner's Appendix. The opinion of the District Court of Nevada dated April 22, 2002 is not published but is reprinted at pages App. 15a to 31a of the Petitioner's Appendix.

STATEMENT OF JURISDICTION

The jurisdiction of the U.S. Supreme Court is based upon the Americans with Disabilities Act, 42 U.S.C. 12101 *et seq.*(hereinafter referred to as "ADA")

Petitioner, KAPLAN, appeals the decision of the Ninth Circuit Court of Appeals in Kaplan v. City of North Las Vegas, 323 F.3d 1226 (9th Cir. 2003), filed on April 1, 2003(Appendix 1a).

The Ninth Circuit denied Petitioner's request for a Re-Hearing En Banc on June 26, 2003(Appendix 33a).

STATUTORY PROVISIONS INVOLVED

1. 42 U.S.C. §12101(7)

> (7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and

relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society;

2. 42 U.S.C. §12101(b)(1)(2)

(b) Purpose

It is the purpose of this chapter-

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

3. 42 U.S.C. §12102(2)(a)(b)(c)

(2) Disability

The term "disability" means, with respect to an individual –

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

4. 42 U.S.C. §12111(8)(9)

(8) Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

(9) Reasonable accommodation

The term "reasonable accommodation" may include-

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

> (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

STATEMENT OF THE CASE

Petitioner, FREDERICK KAPLAN (hereinafter referred to as "KAPLAN"), was employed as a full time deputy marshal for the CITY OF NORTH LAS VEGAS (hereinafter referred to as "CITY") from 1989 until the date of his termination by the CITY, September 1, 1995.

KAPLAN suffered an industrial injury to his right wrist and right thumb on May 4, 1995 while participating in a defense tactics training course.

During the course of his medical treatment for his industrial injury through the CITY's industrial compensation system the physician retained by the CITY, Dr. Mark Reed ("Dr. Reed"), diagnosed KAPLAN as suffering from a permanent congenital disease, rheumatoid arthritis, in his right thumb.

Dr. Reed opined further that KAPLAN's industrial injury had healed and his remaining physical symptoms were solely the result of rheumatoid arthritis.

The CITY referred KAPLAN to a second physician retained by the CITY, Dr. Timothy DeNeau ("Dr. DeNeau"), who confirmed that KAPLAN was suffering from rheumatoid arthritis, and opined that KAPLAN could not safely perform the essential functions of his peace officer position. KAPLAN was terminated from his peace officer position the next day.

It was later determined that KAPLAN had never suffered from rheumatoid arthritis.

KAPLAN filed a Complaint on June 7, 1996 alleging in relevant part that the CITY "regarded" KAPLAN as disabled pursuant to 42 U.S.C. 12102(2)(c) and that the CITY had failed to offer KAPLAN a reasonable accommodation pursuant to 42 U.S.C. 12111(8)(9).

On April 13, 1999, the District Court Judge granted the CITY's first Motion for Summary Judgment holding that KAPLAN was not "regarded as" disabled by the CITY pursuant to 42 U.S.C. 12102(2)(c).

On May 12, 1999, KAPLAN filed a timely appeal to the Ninth Circuit. KAPLAN and the CITY filed timely briefs and oral argument was heard on November 15, 2000. The Ninth Circuit reversed the District Court Judge in Kaplan v. City of North Las Vegas, 2001 W.L. 50532 (9th Cir. Nev.)(hereinafter referred to as "Kaplan I") holding that a genuine issue of fact existed for trial whether the CITY had regarded KAPLAN as disabled.

On January 22, 2002, the CITY filed a second Motion for Summary Judgment arguing that the CITY possessed no duty to provide KAPLAN a reasonable accommodation because he was not "actually disabled" but merely "regarded as" disabled.

On April 22, 2002, the District Court granted the CITY's second Motion for Judgment over KAPLAN's objection that the Court had disregarded the plain language of 42 U.S.C. 12102(2)(c) and 42 U.S.C. 12111(8)(9).

On May 22, 2002, KAPLAN filed a timely appeal of the District Court decision to the Ninth Circuit.

On February 12, 2003, the Ninth Circuit heard oral argument and published an opinion on April 1, 2003 denying KAPLAN's appeal. KAPLAN v. North Las Vegas, 323 F.3d 1226 (9th Cir 2003)(Appendix).

On May 7, 2003, the KAPLAN panel of the Ninth Circuit ordered the parties to submit additional briefs in support or against a Re-Hearing En Banc(Appendix).

Both parties filed timely En Banc briefs.

On June 26, 2003, the Ninth Circuit denied KAPLAN's request for a re-hearing en banc(Appendix).

REASONS FOR GRANTING THE WRIT

The Ninth Circuit's decision unlawfully abandons the plain language of the A.D.A. statute; and conflicts with the 1st Circuit holding in Katz v. City Metal Company Katz v. City Metal Co. 87 F.3d 26, 33 (1996) and the U.S. Supreme Court decision in U.S. Airways v. Barnett 122 S. Ct. 1516, 1525-1526; 152 L.Ed.2d 589, 605-606(2002).

The CITY regarded KAPLAN as suffering from a permanent physical impairment, rheumatoid arthritis,

which prohibited KAPLAN from performing the essential functions all peace officer positions. 42 U.S.C. 12102(2)(C).

Although the CITY was operating under the belief that KAPLAN could not perform the essential functions of all peace officer positions, because he suffered from rheumatoid arthritis, the CITY terminated KAPLAN without engaging in the mandatory interactive process and without offering KAPLAN reasonable accommodations pursuant to 42 U.S.C. 12111(8)(9) to which he was entitled.

It was ultimately determined that KAPLAN never suffered from rheumatoid arthritis. KAPLAN claims that, since the CITY regarded his temporary physical impairment as a permanent, progressive and debilitating impairment which could not be cured or treated, he was considered to be a statutorily disabled employee and was therefore entitled to a reasonable accommodation, job reassignment, pursuant to 42 U.S.C. 12111(8)(9).

The Kaplan II Court abandoned the plain language of 42 U.S.C. 12102(2)(C) and 42 U.S.C. 12111(8)(9) and agreed with the CITY's contention that since the CITY only "regarded" KAPLAN as disabled and KAPLAN was not "actually" disabled, KAPLAN was not entitled to a reasonable accommodation pursuant to 42 U.S.C. 12111(8)(9). According to the Kaplan II Court, a literal interpretation of 42 U.S.C. 12102(C)(2) and 42 U.S.C. 12111(8)(9) leads to "bizarre results". Kaplan v. City of North Las Vegas 323 F. 3d 1226, 1232 (2003)(Appendix).

KAPLAN appeals the decision of the Kaplan II Court finding that employees regarded as disabled

pursuant to 42 U.S.C. 12102(C)(2) are not entitled to reasonable accommodations pursuant to 42 U.S.C 12111(8)(9).

A. THE POLICY OF THE STATUTE SUPPORTS A LITERAL INTERPRETATION OF 42 U.S.C. 12102(C) AND 42 U.S.C. 12111(8)(9).

Congress set forth the purpose of the ADA as follows:

> (b) It is the pupose of this Act—
>
> (1) to provide a clear and comprehensive mandate for the elimination of discrimination against individuals with disabilities;
>
> (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;
>
> (3) to ensure that the Federal Government plays a central role in enforcing the standards established in this Act on behalf of individuals with disabilities; and
>
> (4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and

> to regulate commerce, in order to address the major areas of discrimination faced day-today by people with disabilities.

42 U.S.C. 12101(b) (1-4).

Congress also cited the following findings:

> (7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society;. . .

42 U.S.C. 12101(7).

Significantly, the plain language of 42 U.S.C. § 12102(2)(a)(b)(c) includes both "regarded as" disabled and "actually" disabled employees within the statutory definition of "disability."

The A.D.A. statute defines disability as follows:

(2) Disability

The term "disability" means, with respect to an individual –

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

42 U.S.C. 12102(2)(a)(b)(c). (emphasis added).

Moreover, the plain language of 42 U.S.C. § 12111(8)(9) does not differentiate between "regarded as" disabled and "actually" disabled employees when determining whether an employee is "otherwise qualified" for the job position held or desired pursuant to 42 U.S.C. 12111(8)(9). In relevant part, the statute reads as follows:

(8)**qualified individual with a disability**

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. . . 42 U.S.C. 12111(8)(9)

The 1st Circuit applied the plain language of the statute in Katz v. City Metal Co. 87 F.3d 26, 33 (1996)

and determined that the language of the statute and the intent of the drafters required reasonable accommodations in "regarded as" cases. In relevant part, the 1st Circuit held as follows:

> Congress, when it provided for perception to be the basis of disability status, probably had in mind the more usual case in which a plaintiff has a long-term medical condition of some kind, and the employer exaggerates its significance by failing to make a reasonable accommodation. But both the language and the policy of the statute seem to offer protection as well to one who is not substantially disabled or even disabled at all but is wrongly perceived to be so. And, of course, it may well be that Katz was both actually disabled and perceived to be so.

Katz v. City Metal Co. 87 F.3d 26, 33 (1996). Followed by Jewell v. Reid's Confectionary 172 F. Supp. 2d 212, 219 (2001) (holding that "Second and moreover, the Court cannot agree with Weber [Weber v. Scrippit, 186 F.3d 907 (8th Cir. 1999)] that the disparity in treatment between non-disabled employees whom an employer perceives as disabled, and those whom it does not perceive as disabled, is of sufficient concern to foreclose Plaintiff's claim.)

The Court in Jewel discussed the failure of other courts to follow the plain language of the statute based upon so-called "absurd results" as follows:

> If an employer fails to explore an employees need for reasonable accommodation when the employer wrongly regards the employee as being disabled, opting instead to take adverse action against the employee, it is hardly a "bizarre" result to hold the employer accountable. Indeed, the purpose of the ADA was, in part, to punish employers for making just this sort of "stereotypic [assumption] not truly indicative of the individual ability" of their employees. 42 U.S.C. 12101(a)(7).

Jewell v. Reid's Confectionary, 172 F. Supp. 2d 212, 219 (2001).

The legislative history supports the conclusion that Congress intended that "regarded as" plaintiffs with impairments be entitled to reasonable accommodations. Congress noted that the rationale for the " regarded as" prong of the ADA

> was articulated by the Supreme Court in School Board of Nassau County v. Arline. The Court noted that although an individual may have an impairment that does not in fact substantially limit a major life activity, the reaction of others may prove just as disabling. "Such an impairment might not diminish a person's physical or mental capabilities, but could nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment."

> The Court concluded, that by including this test, "Congress acknowledged that society's accumulated myths and fears about disability and diseases are as handicapping as are the physical limitations that flow from actual impairment."
>
> Thus, a person who [suffers an adverse employment action] because of the myths, fears and stereotypes associated with disabilities would be covered under [the "regarded as" prong], whether or not the employer's perception was shared by others in the field and whether or not the person's physical or mental condition would be considered a disability under the first or second part of the definition.
>
> Sociologists have identified common barriers that frequently result in employers excluding disabled persons. These include concerns regarding . . . acceptance by co-workers and customers.

Jacques v. DiMarzio 200 f. Supp. 2d 151, 166-167; (2002)H.R. Rep 101-485 (III), 1990 U.S.C.C.A.N. 445, 453 (quoting Sch.Bd. of Nassau County v. Arline, 480 U.S. 273, 284, 94 L. Ed. 2d 307, 107 S. Ct. 1123 (1987)).

In Arline, the Supreme held that a teacher who had a contagious but not substantially limiting form of tuberculosis was "handicapped" under the "regarded as" prong of the rehabilitation act. See Arline, 480 U.S. at 284. The Court also noted that the teacher was entitled to reasonable accommodations. See id. at 289 n. 19.

Congress's explicit recall of Arline in the legislative history of the ADA is a template of legislative intent since the ADA must be construed " to grant at least as much protection as provided by . . . the rehabilitation act " Bragdon v. Abbott, 524 U.S. 624, 632, 141 L. Ed 2d 540, 118 S. Ct. 2196 (1998).

In the instant case, it was the CITY that believed KAPLAN was suffering from a permanent physical impairment, rheumatoid arthritis, which prohibited KAPLAN from performing the essential functions of his job.

Despite the CITY's belief that KAPLAN actually suffered from rheumatoid arthritis, KAPLAN was terminated without being offered reasonable accommodations pursuant to 42 U.S.C. 12111(8)(9) and made no attempt to engage KAPLAN in the mandatory interactive process.

Clearly, the CITY's adverse employment action, terminating KAPLAN one day following its determination that he suffered from rheumatoid arthritis, establishes that the CITY's mind set was infected with myth, fear and stereotype regarding all individuals who suffer from rheumatoid arthritis. The CITY's mind set is evident in the CITY's Response to Discrimination Statement filed at the Nevada Equal Right's Commission wherein the CITY stated as follows:

> To date, there is no known cure for rheumatoid arthritis. The condition only worsens with time. Because he is suffering from a genetic, non-industrial condition from which he could not recover, Mr. Kaplan is not entitled to

remain on temporary modified duty as an inmate worker coordinator.

Rheumatoid arthritis is a treatable condition and those who suffer from the condition are able to lead near normal lives. The intent of the A.D.A. statute is to protect employees with a statutory disability from these types of stereotypical assumptions by an employer regarding an impairment. The American Medical Association Encyclopedia of Medicine p. 871 (1989).

The Kaplan II Court discharges the CITY of its statutory obligation pursuant to 42 U.S.C. 12111(8)(9) because KAPLAN ultimately did not suffer from rheumatoid arthritis. However, if KAPLAN actually suffered from rheumatoid arthritis on the date of his termination, the CITY would be liable for failing to provide KAPLAN a reasonable accommodation pursuant to 42 U.S.C. 12111(8)(9).

The Kaplan II Court's decision frustrates the intent of the ADA statute which is to protect employees from the mind set of employers infected with myths, fears, and stereotypes regarding disabilities. The Ninth Circuit's ruling, disregarding the plain language of the statute, leads to truly bizarre results by excusing the CITY's discriminatory behavior simply because KAPLAN was "only" perceived disabled and should be vacated by this Honorable Court.

B. THERE IS NO LAWFUL REASON TO ABANDON THE PLAIN LANGUAGE 42 U.S.C. 12102(C) AND 42 U.S.C. 12111(8)(9).

No legal or factual justification exists supporting the Kaplan II Court decision that a literal interpretation

of the ADA statute produces "bizarre results". The first prong of the A.D.A. statute clearly separates a "regarded as" disabled employee from other employees who may have a similar impairment, but are not regarded as substantially impaired from performing a major life activity. As such, when an employer "regards" an employee as disabled, or unable to perform a major life activity, the employee has been treated differently than an "impaired" but non-statutorily-disabled employee.

The ADA was drafted to protect individual's with statutory disabilities from the myths fears and stereotypes which infect an employer's mindset regarding disabilities. Curiously, the Kaplan II Court's policy analysis is more concerned with protecting impaired employees who are not "regarded as" disabled by their employers, rather than employees who are "regarded as" actually disabled by their employers. The statute is not intended to protect impaired but non-disabled employees. KAPLAN fails to comprehend the so-called "absurdity" of protecting statutorily disabled employees from discrimination pursuant to 42 U.S.C 12101 and 42 U.S.C. 12111.

The Kaplan II Court's decision to disregard the plain language of the A.D.A. statute relies upon the analysis contained in Weber v. Scrippit, 186 F.3d 907 (8th Cir. 1999) wherein the Weber Court argued that a literal interpretation of the statute led to "absurd results"[1]. If a literal interpretation of statute leads to absurd results a court "must look beyond the plain

---

[1] According to Webster's Dictionary, Third College Edition, Absurd is defined as follows: so clearly untrue or unreasonable as to be laughable or ridiculous.

language of the statute". Royal Foods Co., Inc. v. RJR Holdings, Inc., 252 F.3d 1102, 1108 (9th Cir. 2001)

When the United States Supreme Court has found the terms of a statute unambiguous, judicial inquiry is complete, except in rare and exceptional cases. TVA v. Hill, 437 U.S. 153, 187, n. 33 (1978) (quoting Crooks v. Harrelson, 282 U.S. 55, 60 (1930)

> The Supreme Court set out the test for "absurdity" as follows:
>
> What is the test for absurdity? The contradiction of reason, it may be said, and to make an immediate application to legislation, the contradiction grows out of the subject matter of the legislation and the purpose of the legislators. But all legislation is not simple nor its consequences obvious or to be controlled, even if obvious. Whether there should be any legislation at all and its extent and form may be matters of dispute. Its consequences may be viewed with favor or with alarm: some regretted but some accepted as inevitable – accepted as the shadow side of the good. In such situation it is for the legislature to determine, and it is very certain that the judiciary should not refuse to exercise that determination from its view of some consequence which (to use the thought and nearly the words of Chief Justice Marshall) may have been contemplated and appreciated when the act was passed and considered as overbalanced by the particular advantages

> the act was calculated to produce. United States v. Fisher 2 Cranch, 358, 389. Therefore the sound rule expressed in Sturges v. Crowninshield, 4 Wheat. 202: "it would be dangerous in the extreme, to infer from extrinsic circumstances, that a case for which the words of an instrument expressly provide, shall be exempted from its operation. Where words conflict with each other, where the different clauses of an instrument bear upon each other, and would be inconsistent unless the natural and common import of words be varied, construction becomes necessary, and a departure from the obvious meaning of words is justifiable. **But , if in any case, the plain meaning of a provision, not contradicted by any other provision in the same instrument, is to be disregarded, because we believe the framers of that instrument could not intent what they way, it must be one in which the absurdity and injustice of applying the provision to the case, would be so monstrous that all mankind would, without hesitation, unite in rejecting the application."**

Pirie v. Chicago Title & Trust Company 182 U.S. 438, 451; 21 S. Ct. 906, 911-912; 45 L. Ed. 1171, 1179 (1901). **(emphasis added).**

In relevant part, The Kaplan II Court relied upon the following analysis in Weber which explained the position that a literal interpretation of the ADA statute produced "absurd results":

> The A.D.A. cannot reasonably have been intended to create a disparity in treatment among impaired but non-disabled employees, denying most the right to reasonable accommodations but granting to others, because of their employer's misperceptions, a right to reasonable accommodations no more limited than those afforded actually disabled employees. Accordingly, we hold that "regarded as" disabled Plaintiffs are not entitled to reasonable accommodations.

Weber v. Scrippit, 186 F.3d 907, 917 (8th Cir. 1999). Followed by Workman v. Frito-Lay, Inc., 165 F. #d 460, 467 (6th Cir 1999)(holding "regarded as" plaintiffs are not entitled to reasonable accommodations, without explanation) ; Newberry v. E. Texas State Univ., 161 F3d 276, 280(5th Cir 1998)(holding "regarded as" plaintiffs are not entitled to reasonable accommodations, without explanation) Deane v. Pocono Med Center., 142 F3d 138, 148 n. 12 (3d Cir 1998) (en banc) (declining to rule on issue "we express no position on the accommodation issue" Id.,)

The Weber Court reached the above mentioned holding based upon the following:

> The reasonable accommodation requirement makes considerably less sense in the perceived disability context. Imposing liability on employers who fail to accommodate non-disabled employees who are **simply** regarded as disabled would lead to bizarre results. Assume, for instance, that Weber's heart condition

> prevented him from relocating to Akron but did not substantially limit any major life activity. Absent a perceived disability, defendants could terminate Weber without exposing themselves to liability under the ADA. If the hypothetical is altered, however, such that defendants mistakenly perceive Weber's heart condition as substantially limiting one or more major life activities, defendants would be required to reasonably accommodate Weber's condition by, for instance, delaying his relocation to Akron. Although Weber's impairment is no more severe in this example than in the first, **Weber would now be entitled to accommodations for a non-disabling impairment that no similarly situated employees would enjoy.**

Weber v. Scrippit, 186 F.3d 907, 916 (8th Cir. 1999)

The Weber Court's reasoning is baffling. First, the Court minimizes the significance of the 42 U.S.C 12101(2)(c) by referring to the provision as "simply" regarded as disabled. Second, if Weber is "regarded as" disabled he is not a "similarly situated employee" with an employee who is impaired but not "regarded as disabled". The purpose of the ADA is to protect employees with statutory disabilities not employees with impairments which do not meet the statutory criteria outlined by the ADA.

Moreover, the Weber Court clearly fails to comprehend the difficult legal standards associated with establishing that an employer has "regarded" an

employee as disabled pursuant to 42 U.S.C. 12101(2)(C)[2]. It is no small task[3] establishing that an employer has regarded an employee as disabled. A simple understanding of the statutory scheme reveals that impaired employees who are "**not** treated as disabled" by their employers are not entitled to protection under the ADA. This provision of the statute separates KAPLAN from the so-called "impaired but non-disabled employee" referred to by the WEBER Court.

The Kaplan II Court followed the analysis in Weber and cited three reasons why "regarded as" disabled employees should not be entitled reasonable accommodation.

---

[2] Significantly, the Weber Court upheld the jury's decision finding that the Plaintiff was not "regarded as" disabled by his employer. *Id*. pp. 907, 914-15. As such, the Weber court should not have rendered a holding regarding whether the Plaintiff was "otherwise qualified" for the position in question pursuant to 42 U.S.C. 12111(8)(9).

[3] The Kaplan I Court held as follows:

> When comparing the job which Kaplan was regarded as unable to perform versus the number and types of jobs utilizing similar training, knowledge and skills from which Kaplan would also be disqualified, we find that "peace officer" describes a sufficiently broad "class of jobs" under these regulations.

Kaplan v. City of North Las Vegas 2 Fed. Appx. 727 (2001). See Sutton v. United Air Lines, Inc., 527 U.S. 471, 493, 144 L.Ed. 2d 450, 119 S. Ct. 2139(1999).

First the Kaplan II Court stated:

> "If we were to conclude that "regarded as" plaintiffs are entitled to reasonable accommodation, an impaired employee would be better off under the statute if their employers treated them as disabled even if they were not".

Kaplan v. City of North Las Vegas 323 F. 3d 1226, 1232 (2003)(Appendix).

This is not an injustice where "mankind would, without hesitation, unite in rejecting the application". Pirie v. Chicago Title & Trust Company 182 U.S. 438, 451; 21 S. Ct. 906, 911-912; 45 L. Ed. 1171, 1179 (1901).

In the instant case, KAPLAN was mistakenly regarded as suffering from rheumatoid arthritis. The mind set of the CITY was set forth in its Response to Discrimination Statement as follows:

> To date, there is no known cure for rheumatoid arthritis. The condition only worsens with time. Because he is suffering from a genetic, non-industrial condition from which he could not recover. . .

If the CITY had not viewed KAPLAN with its stereotypic beliefs regarding rheumatoid arthritis he would have continued to receive treatment for his industrial injury. The CITY believed KAPLAN suffered from rheumatoid arthritis and that he could not recover. This was the sole reason KAPLAN was terminated. The

statute was drafted to protect employees who are regard as disabled from just this type of discrimination.

Second, the Kaplan II Court stated as follows:

> Dispelling stereotypes about disabilities will often come from the employees themselves as they demonstrate their capacity to be productive members of the workplace notwithstanding impairments. Were we to entitle "regarded as" employees to reasonable accommodation, it would do nothing to encourage those employees to educate employers of their capabilities, and do nothing to encourage the employers to see their employees' talents clearly; instead, it would improvidently provide those employees a windfall if they perpetuated their employees misperception of a disability.

Kaplan v. City of North Las Vegas 323 F. 3d 1226, 1232 (2003)(Appendix), See Taylor v. Pathmark Stores, Inc., 177 F.3d 180, 196 (3rd Cir. 1999).

This is not an injustice where "mankind would, without hesitation, unite in rejecting the application". Pirie v. Chicago Title & Trust Company 182 U.S. 438, 451; 21 S. Ct. 906, 911-912; 45 L. Ed. 1171, 1179 (1901).

In the instant case KAPLAN was terminated within one day of the CITY determining that his rheumatoid arthritis prohibited KAPLAN from performing the essential functions of all peace officer positions.

It seems truly bizarre that the Kaplan II Court approves of the CITY's behavior . Significantly, on the date of the adverse employment action KAPLAN was viewed as "actually disabled" by the CITY. With a "terminate first ask questions later" policy how are employers and employees supposed to engage in the education and talent sharing discovery discussed by the KAPLAN II Court? Moreover, Employees who "perpetuate" a misperception would clearly be acting in "bad faith".

Finally, the Kaplan II Court opined as follows:

> To require accommodation for those not truly disabled would compel employers to waste resources unnecessarily, when the employers' limited resources unnecessarily, when the employers' limited resources would be better spent assisting those persons who are actually disabled and in genuine need of accommodation to perform their potential.

Id.(Appendix)

This is not an injustice where "mankind would, without hesitation, unite in rejecting the application". Pirie v. Chicago Title & Trust Company 182 U.S. 438, 451; 21 S. Ct. 906, 911-912; 45 L. Ed. 1171, 1179 (1901).

The Kaplan II Court cites no rationale basis for referencing reasonable accommodations in "regarded as" cases as an unnecessary waste of resources. If the employer has made an error and "mistakenly" regarded an employee as disabled there is no logical reason why the employer should not pay for the mistake. The

Kaplan II Court essentially argues that a literal interpretation of the ADA evokes an absurd result because employers must pay for their discriminatory mistakes. KAPLAN asserts that the alternative, termination of the "regarded as" disabled employee without accommodation, is an absurd result and contrary to the intent of the ADA.

Therefore, no lawful basis exists to abandon the plain language of 42 U.S.C. 12101(C) and 42 U.S.C. 12111(8)(9).

C. THE NINTH CIRCUIT'S DECISION REMOVES THE "MANDATORY INTERACTIVE PROCESS" FROM ALL "REGARDED AS" DISABLED CASES.

If an employer believes an employee is statutorily disabled, an employer is required to engage in the mandatory interactive process.

The "vast majority" of courts. . . have held that employers have a mandatory obligation to engage in an interactive process with employees who may be in need of an accommodation for disabilities. See Barnett v. U.S. Air, 228 F. 3d 1105, 1112, (9th Cir. 2000), rev'd on other grounds, 122 S. Ct. 1516, 1527; 152 L.Ed.2d 589, 605(2002); See also Barnett (Stevens, J., concurring)(noting that the Ninth Circuit's holding with respect to interactive process was "correct" and "is" untouched by the [Supreme] Court's opinion")

The interactive process obligation is not explicitly statutorily provided for, it is viewed as being "inherent in the statutory obligation to offer a reasonable accommodation to an otherwise qualified

disabled employee." Smith v Midland Brake Inc., 180 f.3d 1154, 1172 (10th Cir 1999). As the legislative history makes clear:

> A problem-solving approach should be used to identify the particular tasks or aspects of the work environment that limit performance and identify possible accommodations. . . Employers first will consult with and involve the individual with a disability in deciding on the appropriate accommodation.

S. Rep. No 101-116, at 34 (19890; see also H.R. Reop. No. 101-485, pt. 2, at 65 (1990), U.S. Code Cong. & Admin. News at 303, 348.

On the date of termination the CITY believed KAPLAN suffered from rheumatoid arthritis. In the instant case, the CITY failed to engage in any interactive process. It is entirely irreverent that KAPLAN later discovered he never had rheumatoid arthritis. The CITY should have made an attempt at dialogue to explore possible accommodations for KAPLAN's rheumatic condition.

The Kaplan II Court's ruling removes the requirement of an employer to engage in the mandatory interactive process to determine whether a reasonable accommodation is available for a regarded as disabled employee. The ruling creates situations where employers can "roll the dice" or terminate first and ask questions later.

This Court held in Barnett v. U.S. Air as follows:

> Without the possibility of liability for failure to engage in the interactive process, employers would have less incentive to engage in a cooperative dialogue and explore fully the existence and feasibility of reasonable accommodation. The result would be less accommodation and more litigation, as lawsuits become the only alternative for disabled employees seeking accommodation. This is a long way from the framework of cooperative problem solving based on an open individualized exchange in the work place that the A.D.A. intended. Therefore, summary judgment is available only where there is no genuine dispute that the employer has engaged in the interactive process in good faith.

Barnett, 228 F.3d 1105, 1115 (2000); *see also*, Smith, 180 F.3d at 1172 ("the interactive process includes good faith communications between employer and employee").

The interactive process is meant to require an employer and employee to communicate and determine what, if any, accommodation is available which will allow the employee to either perform his job, the job he seeks, or possible reassignment.

The Kaplan Court's decision achieves a result contrary to the "inherent statutory obligation to offer a reasonable accommodation to an otherwise qualified disabled employee." Smith v Midland Brake Inc., 180 f.3d 1154, 1172 (10th Cir 1999).

Specifically, by not requiring an employer to provide reasonable accommodation or engage in the mandatory interactive process with "regarded as" disabled employees, the KAPLAN panel's ruling mandates a removal of communication between the "regarded as" disabled employee and the employer who believes, based upon myth, fear and stereotype, that the employee is unable to perform a major life activity due to disability. Therefore, it discourages employers from seeing their employees' talents more clearly and encourages litigation which wastes employer resources.

Moreover, if an employee **perpetuated** the employer's misperception of disability, the employee would clearly not be participating in the interactive process in good faith. Humphrey v. Memorial Hospital Association, 239 F.3d 1128, 1137 (9th Cir. 2001) ("the Interactive process requires communication and good faith exploration of possible accommodations between employers and individual employees . . .")

In the instant case, the CITY was not educated about the talents and abilities of employees who possess rheumatoid arthritis. In bad faith, the CITY failed to engage in the interactive process and terminated KAPLAN within one (1) day of determining that rheumatoid arthritis prohibited KAPLAN from performing the essential functions of all peace officer positions in the State of Nevada..

Therefore, absurd results occur, which are contrary to the legislative intent of the A.D.A. statute (a cooperative problem solving approach based upon an individualized exchange in the work place), when employers are exempted of the responsibilities and obligations mandated by A.D.A.'s interactive process.

CONCLUSION

Based upon the above, KAPLAN respectfully requests that this Honorable Court issue a Writ of Certiorari to review the judgment of the Ninth Circuit Court of Appeals in Kaplan v. City of North Las Vegas, 323 F.3d 1226 (9th Cir. 2003)(Appendix 1a-14a).

Respectfully submitted,

James E. Gallo, Jr., Esq.
Counsel of Record
The Law Office of
Andrew M. Leavitt, Esq.
633 South Seventh Street
Las Vegas, Nevada 89101
(702) 382-2800
Attorney for Petitioner

(Any footnotes trail end of each document)

No. 02-16048

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FREDERICK KAPLAN,
Plaintiff-Appellant,

v.

CITY OF NORTH LAS VEGAS; THOMAS H. STEPHENS,
Defendants-Appellees.

February 12, 2003, Argued and Submitted,
San Francisco, California
April 1, 2003, Filed

COUNSEL: James C. Gallo, Law Office of Andrew M. Leavitt, Las Vegas, Nevada, for the plaintiff-appellant.

Malani L. Kotchka, Smith & Kotchka, Las Vegas, Nevada, for the defendants-appellees.

JUDGES: Before: Barry G. Silverman, Ronald M. Gould, Circuit Judges, and Charles R. Weiner, * Senior District Judge. Opinion by Judge Gould.

OPINION BY: Ronald M. Gould

OPINION: GOULD, Circuit Judge:

Plaintiff-Appellant Frederick Kaplan was a peace officer employed by the Defendant-Appellee City of North Las Vegas (City). After being injured in a training exercise, Kaplan could not hold a gun or grasp objects with his

right hand. When Kaplan's pain continued after therapy sessions, Kaplan's slow recovery was attributed to rheumatoid arthritis, a conclusion later determined to be a misdiagnosis. Based on this misdiagnosis, the City believed Kaplan's injury was permanent. The City fired Kaplan.

Kaplan filed suit under the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101, against the City. n1 The complaint alleged that the City discriminated against Kaplan by terminating him from his peace officer position because of a disability, rheumatoid arthritis. The United States District Court for the District of Nevada granted the City's motion for summary judgment after concluding that Kaplan could not show that he is a "qualified individual with a disability" within the meaning of the ADA. On this appeal we consider (1) whether Kaplan could perform the essential functions of a peace officer position without an accommodation and (2) whether Kaplan was entitled to reasonable accommodation when the City regarded him as having a disability even though he did not have an actual disability.

I

The City hired Kaplan in 1989 as a deputy marshal, or peace officer. According to the City's 1991 description of the deputy marshal position, a deputy marshal must be able to perform the following essential job functions: (1) use of force while "restraining prisoners during altercations," (2) "frequent to constant use of hands and arms in reaching, handling, grasping, gripping, and fingering while operating . . . firearms and restraining arrestees," and (3) physical demands including "hand-to-hand combat." n2

In a joint pretrial order, Kaplan and the City stipulated that as a deputy marshal (1) Kaplan used his thumb, fingers and handgrip to apply handcuffs in a combative situation, (2) Kaplan had to restrain people using his hands, and (3) Kaplan's job required the constant use of both hand and arms for grasping and gripping while keyboarding, filing, telephoning, operating controls, driving, and required the ability to use firearms.

Kaplan seriously injured his right wrist and thumb during a defensive tactics training exercise on May 3, 1995. He was medically treated through the City's industrial compensation program and reassigned to a civilian light duty position as an Inmate Worker Coordinator on May 23, 1995. As an Inmate Worker Coordinator, Kaplan supervised "inmate workers in a variety of housekeeping tasks related to City buildings/vehicles and commercial type laundry service tasks with the detention facility to ensure proper and efficient performance." In this position, Kaplan was not required to arrest or detain any of the prisoners; he did not use a firearm or handcuffs.

Upon referral, on May 23, 1995, Kaplan went to Nova Care Outpatient Rehabilitation Center. He complained of right hand pain when holding objects such as his gun. He rated his pain 10 out of 10 while holding objects in his right hand. From June 14 to 16, 1995, Kaplan continued to experience "extreme pain in regard to his right thumb when he grasped something with it." As of July 6, 1995, Kaplan reported pain "so intense that if he [did] not let go of an object, pain [would] travel proximally up his arm until he dropped whatever he [was] holding."

On July 17, 1995, Kaplan went to see Dr. Mark Reed, who noticed that when he and Kaplan shook hands,

"[Kaplan] exhibited facial grimacing, groaning, swearing, and strange pain behavior, jerking, grabbing the right upper extremity and holding it for a period of about ten seconds, with later relief." Dr. Reed recommended more physical therapy sessions at Nova Care and ordered testing for arthritis.

On August 1, 1995, Kaplan told a Nova Care therapist that he "feared the possibility that he would be unable to hold onto a prisoner because of the pain in his right hand." That same day, Dr. Reed concluded that, based on a bone scan and elevated rheumatoid factor in his blood, Kaplan had rheumatoid arthritis of a non-industrial and pre-existing nature. Dr. Reed recommended "a full duty work release, with his employer to evaluate his ability to handle a gun."

Kaplan gave Dr. Reed's full duty release except for gun handling to Deputy Chief Harlan Enlow. Despite Dr. Reed's release, Kaplan was kept on light duty. On August 25, 1995, Enlow offered Kaplan the opportunity to qualify at the pistol range. n3 Kaplan, however, did not accept this opportunity because department rules do not permit employees to qualify on the gun range until they are released to full duty by a doctor.

On August 30, 1995, Kaplan had an appointment with Dr. Timothy Deneau, a physician that routinely performed "fitness-for-duty" evaluations for the City. Dr. Deneau concluded that Kaplan suffered from rheumatoid arthritis and that any work-related injury sustained in May 1995 had stabilized. Having determined that Kaplan's condition was permanent, Dr. Deneau concluded: I do not feel that Mr. Kaplan is able to perform the required essential functions of the job, which requires constant use of the hand in grasping and gripping, specifically I do not believe he can hold a hand

gun and use a firearm to qualify as required under state regulations. In fact, it may be a safety concern for himself, coworkers and others, that he may not be able to use his firearm effectively. He may also not be able to grasp and detain suspects, if required, using the right hand.

In the morning of August 31, 1995, Kaplan requested Enlow to give him an opportunity to qualify at the gun range. Enlow denied the request because Kaplan had not yet been released by a doctor to do so. Later that day, Kaplan was terminated. The termination letter noted that Kaplan had been diagnosed with rheumatoid arthritis and noted a concern for Kaplan's ability to use a firearm:Earlier this date, Dr. Deneau informed this office that you *cannot* perform the essential function of your job as Deputy Marshal. The doctor has indicated that you cannot properly handle a gun, that your medical condition presents a risk to yourself and others (in that you could easily have your weapon taken away), and that you cannot properly defend yourself, should you become involved in an altercation. Based on the above, the City has reached its decision to terminate you.

(Emphasis in the original.)

Six days after termination, Kaplan qualified on the gun range at "Shooter's World" on his own initiative. He did not request and was not offered reinstatement. In his deposition, Kaplan testified that he did not recover the ability to perform activities that would constitute essential job functions, e.g. handling controls or driving, until 1996. In the spring of 1998, Kaplan's physician and an independent physician retained by the City determined that Kaplan never suffered from rheumatoid arthritis.

On June 7, 1996, Kaplan filed a complaint in the United States District Court for the District of Nevada, claiming violations of the ADA. On April 13, 1999, the district court granted the City's motion for summary judgment on grounds that Kaplan did not have a "disability" within the meaning of the ADA. On Kaplan's first appeal, we reversed and remanded, concluding that "Kaplan raised a genuine issue of fact that the City regarded him as unable to perform any peace officer position in the State of Nevada." *Kaplan v. City of North Las Vegas*, 2 Fed. Appx. 727, 728 (9th Cir. 2001) (unpublished opinion). On January 22, 2002, the City filed a second motion for summary judgment, which the district court granted on April 22, 2002, concluding that Kaplan failed to establish he was a "qualified individual with a disability" under the ADA. This appeal follows.

II

The ADA represents a Congressional judgment that an individual's education, experience, will to succeed, and adapt-ability may often overcome mere disability. The ADA prohibits discrimination against a "qualified individual with a disability" because of the disability. 42 U.S.C. § 12112. To sustain a claim under the ADA, Kaplan must show that (1) he is "disabled" within the meaning of the Act; (2) he is a "qualified individual" within the meaning of the Act; and (3) he was terminated because of his disability. The district court granted the City summary judgment after concluding that Kaplan was not a "qualified individual" under the ADA. n4 We review the district court's grant of summary judgment de novo and view the facts in the light most favorable to Kaplan. *See Oliver v. Keller*, 289 F.3d 623, 626 (9th Cir. 2002).

The Act defines "qualified individual" as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8). To determine whether Kaplan is a "qualified individual" we must resolve two issues: (1) whether Kaplan was able to perform the essential functions of the peace officer position at the time of his termination without an accommodation, and (2) whether Kaplan was entitled to reasonable accommodation to help him perform the essential job functions of a peace officer.

A.

We first address whether Kaplan could perform the essential job functions of a deputy marshal without accommodation at the time of his termination. *See Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1112 (9th Cir. 2000) (holding an employee must be able to perform essential job functions at the time of termination). We conclude that he could not.

As a part of the essential job functions of a deputy marshal Kaplan was required to restrain prisoners, use firearms, and engage in hand-to-hand combat. In a joint pretrial order filed before the magistrate judge in January, 2002, Kaplan stipulated that: (1) "Kaplan had to use his hands to perform functions of his job;" (2) "Kaplan used his thumb, fingers, and handgrip to control the handcuffs in order to apply them in a combative situation;" (3) "As a part of his duties, it was necessary for Kaplan to physically restrain people by using his hands;" (4) "As part of his *essential job functions*, Kaplan was required to have the constant use of both hands/arms . . . and *to be able to use firearms.*" (Emphasis added.)

It is also undisputed that at the time of his termination Kaplan suffered from severe pain in his right hand, which prohibited him from grasping objects for prolonged periods of time. He admitted the following facts in the joint pretrial order: (1) On May 23, 1995, he complained of increased pain while holding objects such as his gun; (2) From June 14 to 16, 1995, he experienced "extreme pain in regard to his right thumb when he grasped something with it;" and (3) On August 1, 1995, he specifically told a therapist that he "feared the possibility that he would be unable to hold onto a prisoner because of the pain in his right hand." In his deposition, Kaplan testified that he did not recover the ability to perform activities that would constitute essential job functions, e.g. grasping or driving, until 1996, though the pain was still there but getting better.

Kaplan argues that the City should have sent Kaplan to the pistol range to determine whether he was able to handle a firearm. Although an opportunity to qualify at the pistol range may have settled whether Kaplan could use his firearm, it would not have settled whether Kaplan would be able to restrain prisoners or effectively use his handcuffs and defensive tactics in a combative situation. The uncontroverted medical evidence presented to the City at the time of termination indicated that Kaplan had difficulty grasping and holding on to objects. Given the undisputed medical records n5 and Kaplan's admissions, there is no genuine issue of material fact whether Kaplan could perform the essential job functions of a deputy marshal at the time of termination. He could not do so, for even viewing the evidence in light most favorable to Kaplan, when terminated he could not reliably restrain prisoners, detainees, or others whom he might encounter on the job.

B.

The ADA prohibits discrimination against individuals with disabilities who are able to perform essential job functions "with or without reasonable accommodation." 42 U.S.C. § 12111(8). Reasonable accommodations may include making facilities accessible to individuals with disabilities, adjusting work policies, or reassignment to vacant positions. 42 U.S.C. § 12111(9). Having concluded that Kaplan could not perform the essential job functions of a deputy marshal at the time of termination *without* accommodation, the next issue is whether Kaplan was entitled to reasonable accommodation to help him perform the essential functions of the peace officer position.

[4] The Act defines "disability" as: (1) "a physical or mental impairment that substantially limits one or more of the major life activities of such individual;" (2) "a record of such an impairment;" or (3) "being *regarded as* having such an impairment." 42 U.S.C. § 12102(2) (emphasis added). The crux of Kaplan's ADA claim is that the City fired him because City officials thought Kaplan was permanently disabled by rheumatoid arthritis. But rheumatoid arthritis did not prevent Kaplan from fully recovering from his work-sustained injury. Eventually, he did recover. Because Kaplan was allegedly fired based on a misdiagnosis, Kaplan seeks relief under the ADA as an individual who was "regarded as" having a disability, 42 U.S.C. § 12102(2),(3) not as someone who is actually disabled.

Whether "regarded as" plaintiffs are entitled to reasonable accommodation under the ADA is an issue of first impression for this circuit. Some circuits have considered the issue and concluded that "regarded as" plaintiffs are not entitled to reasonable accommodations

under the ADA. *See Weber v. Strippit, Inc.*, 186 F.3d 907, 916-17 (8th Cir. 1999) (holding that "regarded as" disabled plaintiffs are not entitled to reasonable accommodation); *Workman v. Frito-Lay, Inc.*, 165 F.3d 460, 467 (6th Cir. 1999) (same); *Newberry v. E. Texas State Univ.*, 161 F.3d 276, 280 (5th Cir. 1998) (same); *Deane v. Pocono Med. Ctr.*, 142 F.3d 138, 148 n. 12 (3d Cir. 1998) (en banc) (declining to rule on this issue but noting that the argument that employers are not required to provide reasonable accommodation for perceived disabilities has "considerable force"). *But see Katz v. City Metal Co., Inc.*, 87 F.3d 26, 33 (1st Cir. 1996) (allowing "regarded as" plaintiff to proceed, concluding that whether plaintiff could have performed his job with reasonable accommodation was an issue for the jury) n6; *Jacques v. DiMarzio, Inc.*, 200 F. Supp. 2d 151, 163 (E.D.N.Y. 2002) (recognizing that the Second Circuit Court of Appeals has yet to decide the issue but concluding that employers have a duty to accommodate in "regarded as" cases).

Though the weight of circuit authority disfavors interpreting the ADA to require accommodation for "regarded as" plaintiffs, we think it appropriate to approach this important issue with our own analysis. We begin with this principle: "It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, . . . the sole function of the courts is to enforce it according to its terms." *Carson Harbor Village, Ltd. v. Unocal, Corp.*, 270 F.3d 863, 878 (9th Cir. 2001) (quoting *Caminetti v. United States*, 242 U.S. 470, 485, 61 L. Ed. 442, 37 S. Ct. 192 (1917)). We must therefore start analysis by pondering the language of the ADA.

On the face of the ADA, failure to provide reasonable accommodation to "an otherwise qualified individual with a disability" constitutes discrimination. 42 U.S.C. § 12112(b)(5)(A). And, on its face, the ADA's definition of "qualified individual with a disability" does not differentiate between the three alternative prongs of the "disability" definition. 42 U.S.C. §§ 12102(2), 12111(8). The absence of a stated distinction, however, is not tantamount to an explicit instruction by Congress that "regarded as" individuals are entitled to reasonable accommodations. Moreover, because a formalistic reading of the ADA in this context has been considered by some courts to lead to bizarre results, *Weber*, 186 F.3d at 917, we must look beyond the literal language of the ADA. *See Royal Foods Co., Inc. v. RJR Holdings, Inc.*, 252 F.3d 1102, 1108 (9th Cir. 2001) (recognizing a court must look beyond the plain language of a statute when the literal interpretation would lead to an absurd result).

In *Weber*, the Eighth Circuit explained:The ADA cannot reasonably have been intended to create a disparity in treatment among impaired but non-disabled employees, denying most the right to reasonable accommodations but granting to others, because of their employers' misperceptions, a right to reasonable accommodations no more limited than those afforded actually disabled employees. Accordingly, we hold that "regarded as" disabled plaintiffs are not entitled to reasonable accommodations.

186 F.3d at 917. We find this reasoning persuasive and agree with the Eighth Circuit's analysis and holding.

If we were to conclude that "regarded as" plaintiffs are entitled to reasonable accommodation, impaired

employees would be better off under the statute if their employers treated them as disabled even if they were not. This would be a per-verse and troubling result under a statute aimed at decreasing "stereotypic assumptions not truly indicative of the individual ability of [people with disabilities]." 42 U.S.C. § 12101(a)(7). Dispelling stereotypes about disabilities will often come from the employees themselves as they demonstrate their capacity to be productive members of the workplace notwithstanding impairments. Were we to entitle "regarded as" employees to reasonable accommodation, it would do nothing to encourage those employees to educate employers of their capabilities, and do nothing to encourage the employers to see their employees' talents clearly; instead, it would improvidently provide those employees a windfall if they perpetuated their employers' misperception of a disability. *See Taylor v. Pathmark Stores, Inc.*, 177 F.3d 180, 196 (3rd Cir. 1999) (not deciding the issue but noting that "it seems odd to give an impaired but not disabled person a windfall because of her employer's erroneous perception of disability"). To require accommodation for those not truly disabled would compel employers to waste resources unnecessarily, when the employers' limited resources would be better spent assisting those persons who are actually disabled and in genuine need of accommodation to perform to their potential.

Having carefully considered the arguments for and against entitling "regarded as" plaintiffs to reasonable accommodations, we recognize that it is not an easy question because of the language of the statute, but we hold that there is no duty to accommodate an employee in an "as regarded" case. Because Kaplan is not actually disabled, the City did not have a duty to accommodate him. n7

III

Kaplan could not perform the essential functions of the deputy marshal position and the City did not have a duty to accommodate him. The ADA therefore does not entitle Kaplan to relief. The district court correctly granted summary judgment to the City.

AFFIRMED.

Footnotes

* The Honorable Charles R. Weiner, Senior District Judge for the Eastern District of Pennsylvania, sitting by designation.

n1 Thomas H. Stephens, in his official capacity as the City Director of Human Resources, is also a defendant. When we refer to the "City," we also refer to Stephens as a defendant acting on behalf of the City.

n2 This description was modified in May, 1994. The later description did not include the same details regarding essential job functions, but rather indicated that the deputy marshals must meet "annual physical fitness department standards" and must be able to use firearms. The City's standards and training manual for peace officers defines "duties of a peace officer" to mean "those functions that may involve the use of force and the arrest or detention of a person."

n3 Deputy marshals are required to "qualify" at a pistol range every six months in order to prove they are capable of accurate handling of their firearms.

n4 Although we have previously held that Kaplan raises a genuine issue of material fact whether he is "disabled"

within the meaning of the ADA, *see Kaplan*, 2 Fed. Appx. at 728, summary judgment may nevertheless be appropriate if no reasonable trier of fact could find that Kaplan is a "qualified individual." We address that step of the ADA analysis in this appeal.

n5 Kaplan presented controverted medical evidence regarding whether he had rheumatoid arthritis but does not present evidence challenging the severe pain in his right hand and his inability effectively and safely to hold objects, including prisoners, at the time of termination.

n6 The First Circuit in *Katz* assumes that "regarded as" plaintiffs are entitled to reasonable accommodation without providing analysis.

n7 Because the City did not have a duty to accommodate Kaplan, we need not address the issue he raises whether transforming Kaplan's light duty position into a permanent position would have been a reasonable accommodation.

CV-S-96-503-LRL

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

FREDERICK KAPLAN,
Plaintiff,

v.

CITY OF NORTH LAS VEGAS,
Defendant.

ORDER

This case comes before the court on defendant City of North Las Vegas's ("the City's") Motion for Summary Judgment or Judgment as a Matter of Law (#144). The court has considered the motion, Kaplan's Opposition (#147), the City's Reply (#149), Kaplan's Reply to the City's Opposition to Motion to Strike or Deny (#152), Kaplan's Supplemental Opposition to the Motion for Summary Judgment (#197), the City's Supplemental Reply (#198), and the arguments presented by counsel at the hearing on March 18, 2002. For the reasons that follow, the City's motion must be granted.

FACTUAL BACKGROUND

The City hired Kaplan as a deputy marshal in 1989. According to the City's Position Description, a deputy marshal

[p]erforms professional duties in the Municipal Court related to serving warrants and all other lawful paper and directives issued by the Court. Conducts investigations to locate individuals, executes warrants

as required by the Court and makes any arrests where necessary. Transports prisoners to the North Las Vegas Detention/Correction center and escorts prisoners from the jail to the Courtroom. Maintains peace and good order and Courtroom security. Enforces the laws of the State and City and makes arrests for violations. Performs related and assigned duties as required.

As peace officers, deputy marshals are required to carry and be able to use, among other things, firearms, handcuffs and batons, and are required to maintain Peace Officers' Standards and Training ("P.O.S.T.") Certification.

During a defensive tactics training exercise on May 3, 1995, Kaplan seriously injured wed his right wrist and thumb, which rendered him unable to use a firearm or handcuffs, or otherwise physically restrain unruly prisoners. Experiencing significant pain, especially in his right thumb, Kaplan was placed on temporary light duty. He was required to wear a splint and was treated periodically by physicians, practical nurses, and physical therapists. The pain and limited ability to use his right hand continued for several months.

On July 6,1995, a therapist at Nova Care Outpatient Rehabilitation, which specializes in hand rehabilitation, observed that Kaplan experienced intense pain when he placed his hand in "certain positions." At that time Kaplan reported that the pain is "so intense that if he does not let go of an object pain will travel proximally up his arm until be drops whatever he is holding." On July 17, 1995, Kaplan was examined by Dr. Mark Reeds a physician, who observed that when shaking hands Kaplan "exhibit[ed] facial grimacing, groaning, swearing and strange pain behavior, jerking grabbing the right upper extremity and holding it for a period of about ten

seconds, with later relief." On July 28, 1995, Kaplan told the therapist at Nova Care that he experienced "extreme pain" when shaking hands.

On August 1, 1995, again at Nova Care, Kaplan told a therapist that he "fears the possibility that he will have to either use a gun in which he will be unable to hold onto it secondary to pain or the inability to grasp or restrain a prisoner requiring a wide mouth grasp position and thus again not being able to maintain hold on the prisoner." On the same day, Kaplan also saw Dr. Reed, who, based on a bone scan and complete arthritis panel, concluded that Kaplan appeared to have rheumatoid arthritis in his right thumb. Because Kaplan's physical problem was, in Dr. Reed's view, "non-industrial," Dr. Reed recommended a full duty work release subject to the City's evaluation of his ability to handle a firearm.

To that end the City directed Kaplan to be examined on August 30, 1995 by Dr. Timothy Deneau, a physician retained by the City to perform a fitness-for-duty evaluation. Throughout the month of August Kaplan continued to wear a splint on his right hand and remained on light duty. On August 25 1995, Kaplan's deputy chief offered him the opportunity to qualify on the gun range. Because departmental regulations prohibited the handling of firearms until a deputy marshal returned to full duty status, Kaplan declined the offer.

As scheduled, Kaplan met with Dr. Deneau on August 30, 1995. During the examination Dr. Deneau observed that Kaplan's "grip, in handshaking maneuver, is exquisitely painful and he has a 'breakaway' type of a grasp, whereas he grasps and then immediately lets go because of the pain. He is unable to sustain a forceful

grasp longer then (sic) 5 seconds." Dr. Deneau also noted that Kaplan experienced pain when pinching with his right thumb and index finger. According to Dr. Deneau, Kaplan said he had "seen no obvious improvement since the date of injury, despite any medications, physical therapy and treatments." According to Dr. Deneau, Kaplan also related that though he experiences no pain when his right hand is at rest, the pain "goes from 0-100" when he is "gripping or grasping." Based on the examination and on a review of Kaplan's medical records, Dr. Deneau formed the opinion that Kaplan's injury on May 3. 1995 "most likely resulted in a mild ligementous strain and possible tendinitis of the right thumb," which exacerbated a pre-existing condition of rheumatoid arthritis. Dr. Deneau told Kaplan he believed Kaplan was physically unable to do his job. In his report to the City Dr. Deneau wrote:

In my medical opinion, I do not feel that Mr. Kaplan is able to perform the required essential functions of the job, which requires constant use of the hand in grasping and gripping, specifically I do not believe he can hold a handgun and use a firearm to qualify as required under state regulations. In fact, it may be a safety concern for himself, coworkers and other (sic), that he may not be able to use his firearm effectively. He may also not be able to grasp and detain suspects, if required, using the right hand.

Early the next morning, August 31, 1995, Kaplan requested that his deputy chief give him an opportunity to qualify on the gun range. The request was denied because Kaplan had not obtained a doctor's release. Later that day Kaplan was handed a termination letter. The letter noted Dr. Reed's diagnosis of rheumatoid arthritis, and the City's concern that Kaplan may not be able to perform the essential duties of a peace officer,

particularly the ability to carry and use a firearm. The letter concluded:

Earlier this date, Dr. Deneau informed this office that you cannot perform the essential functions of your job as Deputy Marshal. The doctor has indicated that you cannot properly handle a gun, that your medical condition presents a risk to yourself and others (in that you could easily have your weapon taken away), and that you cannot properly defend yourself, should you become involved in an altercation. Based On the above, the City has reached its decision to terminate you.

Id. (emphasis in original).

Six days after he was terminated Kaplan, on his own initiative, qualified on the gun range at "Shooter's World," after which he presented the Chief Marshal with a firearm qualification card. However, he did not request, and was not offered, reinstatement.

On June 7, 1996, Kaplan filed this action against the City alleging principally that his termination violated Title I of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 et seq., in that the City's decision to terminate him stemmed from its erroneous perceptions that he was disabled by rheumatoid arthritis fn1 and that the rheumatoid arthritis rendered him unable to perform the essential functions of his job with or without reasonable accommodations.

At his deposition on October 13, 1998 Kaplan was asked whether at the time he was terminated he had the ability to use his right band in carrying out his duties as a deputy marshal. Specifically, when asked whether be would have had difficulty using his firearm on August 31, 1995, Kaplan testified:

I don't know if I would or not unless I got out on the range and try (sic). I wanted to fry because I thought in my mind I could, but I didn't know whether I could or not and I wanted to try to see if I could.

10/13/98 Deposition, pp. 210-211. When asked whether on August 31, 1995 he could have safely and effectively used a PR24 baton or handcuffs, or safely operated police emergency vehicles without pain in his right band, Kaplan's response was essentially the same:

I think I could have with some pain, yeah, I think I could have, I might have been able to do that . . . I don't know because I never tried, so I don't know.

10/13/98 Deposition, p. 231. When asked whether on August 31, 1995 he could have engaged, without pain, in self-defense tactics or combat with arrestees or prisoners, Kaplan responded:

I don't know, In my mind I probably could, but I don't know, I never tried it, so I really don't know what kind of pain I would be in.

10/13/98 Deposition, p. 232. When asked whether on August 31. 1995 he could have handled his firearm without it being taken from him Kaplan said:

Again, I thought that I could handle it. I don't know if I could have because I never tried. I don't know. But I think in my mind I thought I could handle it.

10/13/98 Deposition, p. 232. When asked whether he thought Dr. Deneau fabricated Kaplan's statement on August 30, 1995 that his pain went from "0-100" when he is "gripping or grasping" Kaplan testified:

No, I don't think he's making it up. I think - - I'm not sure if I said zero to 100. I just don't remember saying that.

10/13/98 Deposition, p. 214. Finally, Kaplan admitted that the pain he experienced in his right hand did not begin to subside until about a year after his termination, and that it was not until 1998 that he knew he had, as he put it, "the power" in his right hand.

SUMMARY JUDGMENT STANDARD

Fed.R.Civ.P. 56(c) provides that summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law," The moving party has the initial burden of demonstrating that there is no genuine issue of material fact. Celotex Corp v. Catrett, 477 U.S. 317. 323 (1986) (citing Adickes v. S.H Kress & Co., 398 U.S. 144 (1970)).

Once the movant has met its burden by presenting evidence which, if uncontroverted, would entitle the movant to judgment as a matter of law at trial, the burden shifts to the opposing party to set forth specific facts demonstrating that there is a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242. 250 (1986). The opposing parry cannot stand on its pleadings, nor simply assert that it will be able to discredit the movant's evidence at trial. See T. W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cr. 1987); Fed. R Civ. P. 56(c). If the factual context makes the opposing party's claim implausible, that party must come forward with more persuasive evidence than would otherwise be necessary to show that there is a genuine issue for trial. Matsushita Elec.

Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986).

"A material issue of fact is one that affects the outcome of the litigation and requires a trial to resolve the parties' differing versions of the truth." Admiralty Fund v. Hugh Johnson & Co., 617 F.2d 1301, 1306 (9th Cir. 1982). When determining whether a genuine issue of material fact exists for summary judgment purposes, all facts and inferences drawn must be viewed in the light most favorable to the responding party. Pollar v. CBS, Inc., 368 U.S. 464, 473 (1962). There is no genuine issue of fact "where the record taken as a whole could not lean a rational trier of fact to end for the nonmoving party." Matsushita Electric Indus. Co., 475 U.S. at 586-87 (citation omitted). The standard for determining a motion for summary judgment is the same standard used to determine a motion for judgment as a matter of law: does the evidence present a sufficient disagreement to require submission to a jury or is it so one-sided that one party must prevail as a matter of law. Musick v. Burke, 913 F.2d 1390, 1394 (9th Cir. 1990).

The court is mindful that the summary judgment procedure "is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action." Celotex Corp., 477 U.S. at 327 (quoting Fed.R.Civ.P. 1).

DISCUSSION

The City contends that no genuine issue of material fact exists as to whether at the time he was terminated Kaplan was able to perform the essential functions of carrying and using firearms, handcuffs and batons, with

or without reasonable accommodation. The City argues that because he was not able to use a firearm and grapple with prisoners, it follows as a matter of law that Kaplan was not a "qualified individual" within the meaning of the ADA. The City therefore maintains that it is entitled to summary judgment.

Kaplan contends that he was able to perform the essential functions of his job, even without accommodation. At oral argument he claimed for the first lime that using a firearm and grappling with prisoners are not essential functions of a North Las Vegas deputy marshal. Kaplan points out although the 1991 version of the "Essential Job Functions" section of the City's Deputy Marshal Position Description expressly included the use of hands in handling, grasping, gripping and fingering while operating office equipment, computers and firearms, and while restraining arrestees, the Position Description was amended on May 31, 1994, In the amended version the purportedly parallel job function description, which requires the use of hands in handling, grasping, gripping and fingering while "keyboarding/filing/phone/operating controls/driving," omits reference to using firearms and restraining arrestees. Kaplan therefore argues that as of May 31, 1994, the City no longer regarded the use of firearms and the restraining of arrestees as essential functions of the position of deputy marshal. Since the City has produced no evidence that he was unable to type, file, use a phone or drive a car, Kaplan maintains that summary judgment is unwarranted. As explained below, Kaplan's argument flies in the face not only of the City's judgment as to which functions are essential, but also established law common sense, and Kaplan's own understanding of the essential nature of his job.

The ADA prohibits a covered employer from discriminating "against a qualified individual with a disability because of the disability of such individual . . . ." 42 U.S.C § 1 2112(a). "To state a prima facie case of discriminatory discharge in violation of ADA, [Kaplan] must establish that (1) he suffers from a disability; (2) that he is otherwise qualified to perform essential functions of employment, with or without reasonable accommodation; (3) that he suffered an adverse employment action; and (4) that a causal connection exists between the adverse employment action and the disability." Hirschhorn v. Sizzler Restaurants International, Inc., 913 F.Supp. 1393, 1398 D.Nev. 1995). Under the ADA, it is Kaplan's burden to demonstrate that he is qualified to perform the essential functions of his employment, with or without reasonable accommodation. Weyer v. Twentieth Century Fox Film Corp., 198 F.3d 1104, 1108 (9th Cir. 2000).

29 C.F.R. § 1630.2(n) defines the term "essential job functions" as "the fundamental job duties of the employment position the individual holds or desires." Among the reasons a function may be essential are that "the reason the position exists is to perform that function." § 1 630.2(n)(2)(i), and that "[t]he function may be highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function." § 1 630.2(n)(2)(iii). Whether a particular function is essential. may be demonstrated by evidence of "~t]he employer's judgment as to which functions are essential," § 1630.2(n)(3)(i), "[w]ritten job descriptions prepared before advertising or interviewing applicants for the job," § 1630.2(n)(3)(ii), and "[t]he consequences of not requiring the incumbent to perform the function." § 1630.2(n)(3)(iv). The determination of whether a function is essential "should be based upon more than

statements in a job description and should reflect the actual functioning and circumstances of the particular enterprise involved." Hall v. United States Postal Service, 857 F.2d 1073. 1079 (6th Cir. 1988).

Kaplan was a deputy marshal. By statute he was vested with the powers of a peace officer. NRS 289.150 fn2 A peace officer is an employee of an agency who is required to be certified by the P.O.S.T. Commission and who "performs the duties of a peace officer without immediate supervision." NAC 289.060 (emphasis added). The term "duties of a peace officer" means "those functions that may involve the use of force and the arrest or detention of a person." NAC 289.040 (emphasis added).

For the purposes of determining minimum training standards, a deputy marshal falls under "Training Category II," which includes "peace officers whose authority or primary duties are limited to a specialized area of law enforcement." fn3 The Training Category II requires successful completion of a course that includes 200 hours of training in, among other things, "legal subjects" such as search and seizure, laws of arrest, civil liability, and use of force; "procedures in the field" such as care and custody of prisoners, survival of officers, and crisis intervention; and "skills of officers" such as physical methods of arrest and defensive tactics, retention of weapons, and qualification for use of firearms. NAC 289.150.

At his April 8, 1998 deposition, Kaplan described his duties in this way:

To enforce the warrants that were issued by Municipal Court and to make arrests of individuals that were wanted by the Municipal Court. To transport prisoners

from one facility to another, from one agency to another agency. To also pick up prisoners that were stopped by the other agencies that had warrants with our jurisdiction. And also I maintained security for the Municipal Court when bailiffs were not available.

4/8/98 Deposition, pp. 17-18.

Based on the foregoing, it is apparent that the ability to carry and use a firearm and to restrain arrestees or inmates are essential functions of the deputy marshal position. The City's Position Description (as amended on May 31, 1994) expresses the City's judgment that a deputy marshal arrests people, transports prisoners, and maintains "peace and good order" in the courtroom. Kaplan himself testified that his fundamental duties were to effect arrests, transport prisoners, and maintain security for the court. Moreover, in view of the extensive peace officer training and certification required by the State of Nevada, the State has determined that the marshal's duties are highly specialized. Inherent in carrying out the fundamental duties of a deputy marshal is the ability to physically subdue a combative prisoner and to effectively handle and use a firearm. See Martin v. Kansas, 190 F. 3d 1120, 1132 (10th Cir. 1999), overruled on other grounds, Board of Trustees of Univ. of Ala. v. Garrett, 121 S.Ct. 955, 967-68 (2001). The potential threat to life and limb of not requiring a deputy marshal to have the ability to perform those functions could be serious if not dire. fn4 Indeed, the very reason a deputy marshal position exists is to provide safety and security. See id. Accordingly, the court rejects Kaplan's contention that carrying firearms and grappling with arrestees or prisoners are not essential functions of the position of deputy marshal.

The remaining question, then, is whether at the time he terminated Kaplan was able to perform two key essential functions of the position of deputy marshal, viz., effectively handling and using a firearm and physically restraining combative prisoners. See Weyer v. Twentieth Century Fox Film Corp., 198 F.3d 1104, 1112 (9th Cir. 2000)("[O]ne must be able to perform the essential functions of employment at the time that one is discriminated against in order to bring suit under Title I."); Nowack v. St. Rita High School, 142 F.3d 999, 1003 (7th Cir. 1998)("The determination as to whether an individual is a 'qualified individual with a disability' must be made as of the time of the employment decision." (citation omitted.)).

Kaplan was injured on May 3, 1995. As of August 1, 1995, he was telling his physical therapist that he "fears the possibility that he will have to either use a gun," in which event he would be unable to hold onto it, or grasp or restrain a prisoner, in which event he would be unable "to maintain hold on the prisoner." On August 30, 1995, Kaplan met with Dr. Deneau for the fitness-for-duty evaluation. Dr. Deneau observed that while shaking hands Kaplan's grip was "exquisitely painful" such that he "immediately let~] go because of the pain," and that he was unable to sustain a forceful grasp for longer than five seconds. Kaplan told Dr. Deneau that he had "seen no obvious improvement since the date of injury, despite any medications, physical therapy and treatments." Kaplan also told Dr. Deneau that he experienced no pain when his right hand was at rest, but that the pain went from "0-100" when he was "gripping or grasping." Based on this medical testimony, it is clear that as of August 31, 1995, Kaplan was unable to use a firearm or restrain a prisoner. Although there is conflicting medical evidence as to whether Kaplan in fact was suffering from rheumatoid arthritis, there is no

medical evidence that Kaplan was able to properly handle a firearm or restrain a prisoner on August 31, 1995.

The only evidence Kaplan offers to rebut the medical testimony is the testimony he gave at a deposition three years later, He was questioned about his ability on August 31, 1995 to use or safely handle a firearm, use a PR24 baton, apply handcuffs, and engage in combat with prisoners. To all of these questions Kaplan responded essentially that while he thought he could do these things, he didn't know that he could. Tellingly, however, when asked at the same deposition how long it took to regain the ability to use both hands in handling/grasping/fingering/ gripping while keyboarding/filing/phone /operating controls/driving." he answered,

I'm not really sure because it was getting better each day. I was getting progressively better. . . . Probably about '97, somewhere around there, in the years of '97, '96. Let's see, '96, yeah, I was getting better, I was feeling better. I was able to grab things, grip things longer, a little bit stronger, until finally I was able to hold on with no problem at all.

10/13/98 Deposition, pp. 92-93. Hence, at the same deposition in which he testified that he "thought" he could properly handle a firearm and subdue prisoners as of August 31, 1995, he also testified that it took at least another year before he was able to use a keyboard and operate the controls of an automobile.

Moreover, Kaplan has offered no independent evidence medical or otherwise in support of his subjective belief. Unsupported by independent evidence, his subjective belief in 1998 that he might have been able to perform

the essential functions of employment in 1995 does not create a material issue of fact in the face of compelling medical evidence to the contrary.

Kaplan contends that the fact that he qualified on the gun range at "Shooter's World" on September 6, 1995 creates an issue of fact as to whether he was capable of handling his firearm on August 31, 1995. The shortcoming of this argument is that the City did not have (and could not have had) this information at the time it decided to terminate Kaplan. Moreover, that the City fired Kaplan while he may have been recovering from his injury "does not obviate the fact was not a qualified individual at the time of termination, and thus not under the protective umbrella of the ADA."

Browning v. Liberty Mutual Insurance Co., 178 F.3d 1043, 1048-49 (8th Cir. 1999). As the Browning court observed, "If, as [plaintiff] contends, [defendant] fired [him] after years of services because of an injury that eventually resulted in a disability, rather than allow [him] to recover, it may be an injustice, but it is not prohibited by the ADA." Id at 1049

For all of the foregoing reasons,

IT IS ORDERED that the City's Motion for Summary Judgment (#144) is granted.

DATED this 22nd day of April, 2002

LAWRENCE R. LEAVITT
UNITED STATES MAGISTRATE JUDGE

Footnotes

fn1 Two physicians who examined Kaplan in 1998 concluded that Kaplan has never had rheumatoid arthritis.

fn2 NRS 289.150 provides in part;

The following persons have the powers of a peace officer;

2. Marshals, policemen and correctional officers of cities and towns.

fn3 At his deposition on April 8. 1998. Kaplan testified that he successfully underwent Category II P.O.S.T. training for marshals, bailiffs and constables, and was thereafter certified as a peace officer was required to carry a firearm. 4/8/98 Deposition. pp. 15-16.

fn4 Analogously, "although a firefighter may not regularly have to carry an unconscious adult out of a burning building, the consequences of failing to require the firefighter to be able to perform this function would be serious." 29 C.F.R. Pt 1630, Appendix to part 1630 Interpretive Guidance on Title I of the Americans with Disabilities Act, § 1630.2(n), Essential Functions. See Kees v. Wallenstein, 161 F.3d 1196, 1199 (9th Cir. 1998) (direct inmate contact an essential function of corrections officer position; hence, ability to restrain inmates during emergency critical to jail security): Hoskins v. Oakland County Sheriff's Department, 227 F.3d 719, 727 (6th Cir. 2000)(although deputy sheriff may infrequently have to physically restrain a prisoner, potential for physical confrontation exists every day; hence, failure to require deputy to perform such activity would pose threat to security); Frazier v. Simmons, 254

F.3d 1247. 1259-60 (10th Cir. 2001)(because law enforcement "investigator is at risk of physical barn during an investigation must be able to run, carry a firearm, and physically restrain offenders in order to protect himself and others, and conduct the investigation"); Martin v. Kansas, supra, 190 F.3d at 1132 (recognizing the "potentially dire consequences" of not requiring a corrections officer to have the ability to restrain violent offenders or respond to emergency situations).

No. 02-16048

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FREDERICK KAPLAN,
Plaintiff-Appellant,

v.

CITY OF NORTH LAS VEGAS et al.,
Defendants-Appellees.

D.C. No. CV-96-503-LRL
May 7, 2003, Filed

Before: SILVERMAN, GOULD, Circuit Judges, and WEINER*, Senior District Judge.

The parties are hereby directed to file simultaneous briefs with the Clerk of the Court setting forth their respective positions on whether the decision in this case, set forth in Kaplan v. City of North Las Vegas, 323 F.3d 1226 (9th Cir. 2003), should be reheard by an en banc panel of this court. The briefs shall be filed no later: than twenty-one (21) this from the date of this order and shall not exceed fifteen (15) pages.

It is so ORDERED.

Footnotes

*The Honorable Charles R. Weiner, Senior District Judge for the Eastern District of Pennsylvania, sitting by designation.

No. 02-16048

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FREDERICK KAPLAN,
Plaintiff-Appellant,

v.

CITY OF NORTH LAS VEGAS; STEPHENS H. THOMAS,
Defendants-Appellees.

June 26, 2003, Filed

Before: SILVERMAN, GOULD, Circuit Judges, and WEINER*, District Judge.

An active judge sua sponte requested a vote on whether to rehear the matter en banc. The parties submitted supplemental briefing advising the court of the merits of rehearing the case en banc.

Judges Silverman and Gould have voted to deny the petition for rehearing en banc and Judge Weiner has so recommended.

The full court was advised of the petition for rehearing. The sua sponte request for a vote was withdrawn. No other judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc is DENIED.

Footnotes

* The Honorable Charles R. Weiner, Senior District Judge for the Eastern District of Pennsylvania, sitting by designation.